

**IN THE SUPREME COURT OF THE UNITED STATES**

**ON WRIT OF HABEAS CORPUS**

**NO. 73**

**UNITED STATES OF AMERICA,**

*Appellant,*

**vs.**

**THE STATE OF MISSISSIPPI ET AL.,**

*Appellees.*

**APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
COURT OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI.**

**WRIT OF HABEAS CORPUS FOR THE REMOVAL OF  
BODIES OF DECEASED PERSONS, AND TO ENFORCE  
REVENUE LAWS.**

**and**

**WRIT IN SUPPORT OF HABEAS**

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1964.

**No. 73**

UNITED STATES OF AMERICA,  
*Appellant,*

vs.

THE STATE OF MISSISSIPPI ET AL.,  
*Appellees.*

APPEAL BY UNITED STATES FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

**MOTION OF APPELLEES TO STRIKE PORTIONS OF  
BRIEF OF AMICUS CURIAE, AND TO STRIKE  
APPENDIX THERETO**

A.

Appellees move the Court to strike all references to the Mississippi constitutional provisions relating to poll taxes appearing in the instrument entitled, "Brief of the American Civil Liberties Union, *Amicus Curiae*", which said references appear at pages 6 and 7, and in pages 29 through 39 thereof. In support of this motion, Appellees would show:

1.

Neither § 241 nor § 243 of the Mississippi Constitution of 1890, providing for the imposition of a poll tax, relate in any way to registration of electors in the State of Missis-

issippi. The complaint filed in this cause only challenged constitutional and statutory provisions of the State of Mississippi relating to voter registration.

## 2.

The "Brief" of the "*amicus curiae*" admits:

"The United States in its Complaint does not assert that the Mississippi Poll Tax is invalid."

No question relative to the validity or invalidity of said poll tax was presented to or ruled upon by the three-judge District Court below; therefore, no such ruling could possibly be presented here for review.

## 3.

The new issue made by the "*amicus curiae*" was not raised in the Jurisdictional Statement or in the Brief for the United States.

## 4.

The "*amicus curiae*" cannot create a cause of action in this appellate court which is different from or in addition to the case or controversy existing and made by the pleadings between the parties and the actions and rulings of the lower court. This Honorable Court cannot create, "*sua sponte*", a new cause of action not embraced within the case or controversy presented by the parties invoking its appellate jurisdiction.

## 5.

No official of the State of Mississippi who is a defendant to this action has any duty to execute or enforce the Mississippi statutes related to poll taxes, enacted under the constitutional provisions set forth in paragraph number

one above. The "*amicus curiae*" doesn't even refer to these statutes. The special three-judge District Court below would have lacked statutory jurisdiction to issue any injunction as to these statutes against such defendants, if such issue could have been made before that court.

## 6.

The "*amicus curiae*" has no standing to assert, in this Honorable Court or in any other court, a new prayer for additional relief of the type which its "Brief" attempts to inject into this cause.

## B.

Appellees further move this Honorable Court to strike in its entirety the pamphlet labeled, "Restrictions on Negro Voting in Mississippi History, Appendix to the Brief of the American Civil Liberties Union, *amicus curiae*", as well as all references to said pamphlet contained in the said "Brief". In support of this motion, Appellees would show:

## 1.

This pamphlet is composed exclusively of incompetent, unauthenticated matter *dehors* the record. No part of such matter was presented to or received by the lower court. Said matter was not subject to cross-examination and on its face can be seen to be composed of second, third and fourth-hand hearsay. Such matter was irrelevant and immaterial to the issues pleaded and would have been inadmissible as evidence for any purpose if it had been duly offered in a court of competent jurisdiction by one having standing as a party to offer or introduce proof in a case or controversy.

2.

The pamphlet constitutes a palpable attempt to influence the decision of this court by reference to matters known to the parties sponsoring it to be outside of the record before this court and outside of the decision of the court below. It is improper to introduce said material into this appeal and especially into the "Brief" of an "*amicus curiae*" by way of such a so-called "Appendix" pamphlet.

3.

When the "Appendix" pamphlet was first lodged for filing with the clerk of this court it was not printed in accordance with the rules of this court. When it was printed and received for filing, the time allowed for the filing of the brief of the party supported had expired as had the time for the filing of such a pamphlet. Appellees have not been asked to agree to any extension of time for such filing, nor have they been notified of any extension therefor granted by the clerk, the Court or any Justice thereof.

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## BRIEF IN SUPPORT OF MOTIONS

### ARGUMENT

#### I.

#### **The Court Should Strike All References to the New Issue Concerning Poll Tax**

The concession, on page 2 of the "*amicus brief*", that the issue of poll tax validity is beyond the issues drawn in the complaint completely disables its presentation even by a party. It would not have been tried in the lower court; and, even if the lower court had considered this issue, it could not be considered here. *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157. Unless this Court is misled into disregarding the constitutional limitation of its jurisdiction to the consideration of cases or controversies, it must result, *a fortiori*, that such an untried issue cannot be originated at the appellate level by a non-party.

The former opinions of this court unanimously prescribe the tactics attempted here. In *Knetsch v. United States*, 364 U.S. 361, 370, the court stated:

"Some point is made in an *amicus curiae* brief of the fact that Knetsch in entering into these annuity agreements relied on individual ruling letters issued by the Commissioner to other taxpayers. This argument has

never been advanced by petitioners in this case. Accordingly, we have no reason to pass upon it."

To the same effect is the case of *Moffat Tunnel Improvement Dist. et al. v. Denver & S. L. Ry. Co.*, 45 F.2d 715, 722 (10 Cir. 1930), wherein the court said:

"Briefs are received from *amici curiae* to aid the court in disposing of issues before the court; friends of the court cannot introduce new issues, nor can they supplant the body to which the legislature has delegated the control of the affairs of the district."

The rules of this Court likewise proscribe the introduction of such new issues, both as to parties [Rule 40(1)(d)(2)] and as to an *amicus curiae* [Rule 42(5)].

Rule 40(1)(d)(2) provides:

"The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."

Rule 42(5) provides:

"All briefs, motions and responses filed under this rule shall be printed; shall comply with the applicable provisions of Rules 35, 39, and 40 (except that it shall be sufficient to set forth the interest of the *amicus curiae*, the argument, the summary of argument if required by Rule 40(1)(f), and the conclusion); and shall be accompanied by proof of service as required by Rule 33."

Strict adherence to such rules is vital if this court is to have any assurance of getting its appellate work done. Should a party be enabled to present new issues not ruled on by the lower courts, or have an *amicus* present them for it, the burdens on this court would surely increase many-fold, for what lawyer ever completed the trial of a case without wishing he had made some different claim or raised just one more issue? Obviously, any course of reasoning that would permit him to bring one new issue here on appeal would let him bring up any number of such untried issues of which he could conceive. If a party should not be directly allowed to suggest new and different matters for the first time on appeal, then no "*amicus*", playing Boswell to a party's Johnson should be permitted to do it for him.

The case at bar is not at all similar to the situation present in *Mapp v. Ohio*, 367 U.S. 643. There the *amicus* brief suggested in a short concluding paragraph that the court adopt an *alternative* course of disposing of the issue presented to and tried by the lower court and which was directly before this court on the appeal, which issue was whether the defendant's conviction was or was not constitutional. The alternative course suggested by the *amicus* was to reverse the conviction by the process of overruling a case cited and relied on by the State to support the admission of illegally obtained evidence (*Wolf v. Colorado*), rather than by construing the State criminal statute under which defendant was convicted. No new, untried issue was thus presented. The *amicus* only suggested that the issue of guilt or innocence already presented be determined by an alternative process of attacking a basis for conviction relied upon by appellee but not suggested by the appellant.

In contradistinction, this "Brief" presents a *new* issue not tried below, not in the record, not in the complaint and not mentioned in the Jurisdictional Statement nor in the brief of either party. It is not even in the same area of statutory and constitutional provisos as those attacked by the complaint. The complaint only drew into controversy such provisions as related to qualifications for registration. The poll tax has nothing to do with and has no effect on registration. A person may become registered and remain registered for the remainder of his life without the payment of a single poll tax. *Bew v. State*, 71 Miss. 1, 13 So. 868; *Dixon v. State*, 74 Miss. 271, 20 So. 839. The payment of that tax is a prerequisite to *voting* in certain State elections but the complaint made no issue, and the lower court made no decision, outside of the field of *registration* prerequisites.

The "Brief" of the "*amicus curiae*" is wholly in error when it alludes (on page 37) to action "by voting registrars in administering the (poll) tax." This tax is administered and collected by the Sheriff who is also the Tax Collector, and by the various election managers at each polling place who determine whether or not this tax has been paid by requiring presentation of poll tax receipts or exemption certificates at the time a person who is registered on the poll books presents himself and offers to vote. The Registrar has no connection with the assessment collection or ascertainment of payment of poll taxes by registered electors. His only function even partly related to such tax is that he is required by law to issue duplicate receipts in the event of loss and that he issue exemption certificates to military personnel and older citizens. (See *Mississippi Code* 1942, § 3161, §§ 3163 through 3163-06, and § 3235.)

Even though the merits of this issue are not before the court, we feel compelled to observe that the *ipse dixit* assertion on page 30 by the "*amicus curiae*" that the 24th Amendment does not furnish apodictic proof that a poll tax is a completely constitutional qualification on the exercise of the franchise in non-federal elections, is as ridiculous as it is unsupported. Why would the Congress and the people make the vain and useless gesture of adding to the Constitution a solemn amendment partially proscribing a qualification that was already wholly impermissible under some other proviso? Certainly the "*amicus*" should have brought some light to bear on this anomaly if it had the slightest hope it would be accepted.

The suggestion of the "*amicus*" that it be allowed to expand the litigation beyond the appeal as taken is contrary to the constitutional limitations on this court's jurisdiction, to precedent and to common sense.

The first reported appellate case reviewed by this court was *Glass, et al. v. The Sloop, Betsey, et al.*, 3 U.S. (3 Dall.) 6. It came up at the fourth term (February, 1794). Since that first case this court has adhered to the practice of limiting the exercise of its review jurisdiction to what has been decided by a lower court. The governing principle was first articulated by Mr. Chief Justice Marshall, as follows:

"It is an essential criterion of appellate review jurisdiction that it reviews and corrects proceedings in a cause already instituted, and does not create that cause." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175.

In *The Schooner Alicia v. The United States*, 74 U.S. (7 Wall.) 571, 573, the court spoke thus:

"An appellate jurisdiction necessarily implies some judicial determination, some judgment, decree or order of an inferior tribunal, from which an appeal has been taken."

Issues not contained in the complaint, questions not presented to trial court, and matters not covered by the record have never been considered by the Supreme Court. This rule was clearly announced in a land title suit decided at the 1833 Term, *Holmes et al. v. Trout et al.*, 32 U.S. (7 Pet.) 171, 210, where the court's expression was:

"No evidence can be looked into in this court, which exercises an appellate jurisdiction, that was not before the Circuit Court; and the evidence certified with the record must be considered here as the only evidence before the court below. If, in certifying the record, a part of the evidence in the case had been omitted, it might be certified in obedience to a certiorari; but in such case it must appear from the record that the evidence was used or offered to the Circuit Court."

In *Mitchel et al. v. United States*, 34 U.S. (9 Pet.) 711, 731, the court stated the rule and reasons thus:

"There is, however, one subject which was considered by him, into which we do not feel at liberty to inquire, which is the watermark in the paper on which the governor's permission of the 7th of January, 1804, was written, noticed and commented on at large by the judge. Record 706. This objection was not made in the court below at the hearing, or in the argument, so that no opportunity was afforded to the petitioner to produce any evidence on the subject, or to his counsel to answer the objection. This court also refused to grant him a commission to take testimony to explain and account for the water-mark, or permit him to read the ex-parte evidence offered to explain it; because in an appellate court no new evidence could

be taken or received without violating the best established rules of evidence and law. Under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which he was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence."

This was followed in *Boone v. Chiles*, 35 U.S. (10 Pet.) 177, 208, with this statement:

"The deed from Newland and wife to Green Clay was not referred to in the pleadings made an exhibit in the cause, or, so far as appears used in the Circuit Court, it was no part of the record before us at the argument of this cause at the last term, and no suggestion of diminution was then made. At the May sessions of the Circuit Court, on a suggestion of the defendant that this deed was on file and had been used at the hearing, the court ordered it to be certified to this court; and the counsel for plaintiffs having agreed to consider it as returned on a certiorari, it has been read, and we have taken it into our consideration as an exhibit in the cause. In doing this, however, we must be distinctly understood as clearly of opinion that it is not admissible by the rules of appellate courts, who can act on no evidence which was not before the court below, or receive any paper that was not used at the hearing."

A number of other cases have been equally as emphatic, e.g., *Davis v. Packard*, 31 U.S. (6 Pet.) 41; *Hudgins v. Kemp*, 59 U.S. (18 How.) 530, 534; *National Bank of the Metropolis v. Kennedy*, 84 U.S. 19, 29; *Kerr v. Clappitt*, 95 U.S. 188; *Bechtel v. U. S.*, 101 U.S. 597; *Hecht v. Boughton*, 105 U.S. 235; *Southern Pine Lumber Co. v. Ward*, 208 U.S. 126; *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 347; *Pennsylvania Railroad Co. v. Public*

*Utilities Commission of Ohio*, 298 U.S. 170, 177. Not even newly discovered evidence may be considered, *dehors* the record, in an appellate proceeding. In *Russell v. Southard et al.*, 53 U.S. (12 How.) 139, 158, the court refused to consider affidavits with this language:

"The decree of the Circuit Court, in this case was reversed during the present term, and a decree entered in favor of the appellant. A motion \*is now made in behalf of Daniel R. Southard, one of the appellees, to set aside the decree in this court, and to remand the case to the Circuit Court for further preparation and proof, upon the ground that new and material evidence has been discovered since the case was heard and decided in that court. In support of this motion affidavits have been filed stating the evidence newly discovered, and that it was unknown to him when the case was heard in the court below.

"It is very clear that affidavits of newly discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it for testimony to influence the judgment of this court sitting as an appellate tribunal. And according to the practice of the Court of Chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal."

*England v. Gebhardt*, 112 U.S. 502, and *McClellan et al. v. Carland, Judge*, 217 U.S. 268, are to the same effect concerning affidavits. In *Yazoo and Mississippi Valley Railroad Company et al. v. Adams*, 180 U.S. 41, the court refused to allow a question outside the record, as to constitutionality of a statute of Mississippi, to be drawn into the questions it considered on a certiorari review, even though the Chief Justice of the State Supreme Court certified that the validity of the statute had been presented in

argument to that court. A transcript of a hearing in another proceeding was refused consideration in *Lawn v. United States*, 355 U.S. 339, 354.

A case analogous to the procedural circumstances in the case at bar is found in *United States v. Hosmer*, 76 U.S. (9 Wall.) 432, where the appeal was from a record made on petition and demurrer before the Court of Claims. The court said:

"The facts set forth in the petition were admitted by the demurrer. The only question before the court was the sufficiency of the facts alleged to warrant the judgment invoked. The case is presented for our consideration in the same manner. We cannot take cognizance of any fact beyond the scope of the record, as it was made up in the court below."

The same situation was involved in *Memphis & St. Louis Railroad Company v. Loftin*, 105 U.S. (15 Otto) 258. This holding was set out in this manner:

"In the elaborate printed argument presented for the appellant, reference is made to facts not stated in the complaint. These we cannot consider. As the case was submitted on demurrer, only the averments in the complaint are before us. While we may take judicial notice of the several statutes of the State which are relied on, the complaint alone must be looked to for information as to the manner in which the lands were acquired and the purposes for which they are held."

It is not sufficient to give this court jurisdiction to try a new issue to show that an issue *might* have arisen in the court below unless (1) the record shows it did arise and (2) was applied to the case by the court below. *Crowell v. Randell*, 35 U.S. (10 Pet.) 368; cf. *Hunter Co. v. McHugh*, 320 U.S. 222.

The court cannot resort to the theory of judicial notice to extend a record which does not reflect that a particular issue was tried by or presented to the trial court. In *Powell v. Brunswick County Supervisors*, 150 U.S. 433, 440, this court long ago established the proper rule in this language:

"If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the state as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered."

See also *Mountain View Mining and Milling Co. v. McFadden et al.*, 180 U.S. 533; *Arkansas v. Kansas & Texas Coal Co. et al.*, 183 U.S. 185; and *Mutual Life Insurance Company of New York v. McGrew*, 188 U.S. 291.

This rule is particularly to be enforced when, as here, the new issues attempted to be injected for the first time at the appellate level are constitutional issues. *Rescue Army et al. v. Municipal Court of the City of Los Angeles*, 331 U.S. 549, 568; *Local No. 8-6, Oil, Chemical & Atomic Workers Intl. Union et al. v. Missouri*, 361 U.S. 363.

In *United States v. Petrillo*, 332 U.S. 1, 5, the court stated:

"Two general principles which concern our disposition of appeals involving constitutional questions have special application to this case: We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage

where the decision of a precise constitutional issue is a necessity. The reasons underlying this principle and illustrations of the strictness with which it has been applied appear in the opinion of the Court in the *Rescue Army v. Municipal Court*, 67 S. Ct. 130, (1409) and cases there collected. And in reviewing a direct appeal from a District Court under the Criminal Appeals Act, supra, our review is limited to the validity or construction of the contested statute. For 'The Government's appeal does not open the whole case.' *United States v. Borden Co.*, 308 U.S. 188, 193, 60 S. Ct. 182, 186, 84 L. Ed. 181."

In *United States v. Spector*, 343 U.S. 169, 172, the Court observed:

"But when a single, naked question of constitutionality is presented, we do not search for new and different constitutional questions. Rather we refrain from passing on the constitutionality of a phase of a statute until a stage has been reached where the decision of the precise constitutional issue is necessary."

In fact, the Court will not even allow both parties to an appeal to agree upon a new issue for this court's review. In *Kearney v. Case*, 79 U.S. (12 Wall.) 275, it was held:

"This case was tried by the court without a jury, and the defendant, against whom a judgment was recovered, brings it here by writ of error.

"No question arises on the process or pleadings; there is no bill of exception, and the plaintiff in error relies on what purports to be a statement of facts in the case to show the error of which he complains. That statement does not profess to be facts found by the judge.

"It says: 'We agree that the foregoing shall be the statement of facts for the writ of error returnable to the Supreme Court of the United States.' It is

signed by defendant in error and by the counsel for plaintiff. The writ of error had been sued out nine months before this paper was signed and filed with the clerk.

It needs no argument to show that this court cannot look into such a paper as part of the record, nor make it the foundation of revising the judgment, though both parties consent to it. The case here must be tried on the rulings of the court below on what was before it, and this must appear by the record; and if the facts are to be considered they must appear by bill of exceptions, or by an agreed statement submitted to the court for its judgment, or by the finding of the court under the statute. It cannot be permitted that the parties, by consent, make up a case for this court after it has passed from the control of the court below. The case of *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65, is not a parallel case. There the statement, such as it was, was made by the judge, and on it he founded his judgment. It was made and filed at the time the judgment was rendered; and although defective in many respects, there was sufficient in it to present the legal propositions, if the confused character of the paper was waived. This the counsel here desired to do, and the court permitted. We are all of opinion, therefore, that the paper called a statement of facts must be disregarded."

See also *Metropolitan Railroad Co. v. MacFarland et al.*, 195 U.S. 322 and cf. *Barr v. Matteo et al.*, 355 U.S. 171.

The Court has also reasoned that it would be improper for it to intimate an opinion on an issue not arising on the face of the record, which issue might occur in some other trial. *Mutual Life Insurance Company of New York v. Snyder*, 93 U.S. 393.

The lack of standing to have brought an action seeking the new relief is a fatal defect to the grant of any such new

relief as requested at the behest of the incorporated "*amicus curiae*". In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130, the court said:

"This is not a bill brought by the state of Georgia, to annul the contract, nor does it appear to the court, by this count, that the state of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this: One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

"This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law."

This same "*amicus*" has been adjudicated to have no such standing as would have supported any independent claim by it for relief which is based upon individual rights of natural persons. In *Hague v. C.I.O.*, 307 U.S. 496, the court in its opinions stated:

"Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for 'citizens of the United

States.' Only the individual respondents may, therefore, maintain this suit." (p. 514)

"As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. *Northwestern Nat. Life Insurance Co. v. Riggs*, 203 U.S. 243, 255, 27 S. Ct. 126, 129, 51 L. Ed. 168, 7 Ann. Cas. 1104; *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363, 27 S. Ct. 384, 385, 51 L. Ed. 520." (p. 527)

We trust the Court will not be offended if we make the further, obvious comment that this corporation "*amicus*" could not become a qualified voter under the franchise laws of Mississippi or any other state. It certainly cannot claim to enjoy any such statutory status to assert the rights of individuals as 28 U.S.C. 1971 conferred upon the United States. The lack of any statement of interest in the Brief or Motion of the "*amicus*" is significant in this regard. The Justices of this Court may have private personal knowledge of some interest which this corporation might have set out, but Rule 42(3) of this Court requires that the nature of that interest be *concisely stated*, and this was not done. As to the new issue attempted to be presented, a compliance with this reasonable rule was especially vital. Such compliance ought not be disregarded.

## II.

### **The Court Should Strike the Appendix Pamphlet Filed by the "Amicus"**

It is difficult to know just where to begin to point out the errors in a document so unique and so fallacious as the appendix pamphlet. We find nothing similar to it mentioned in the published records of this court since 1834. In

that year, Mr. Chief Justice Marshall treated with a similar pamphlet in a preliminary opinion in the case of *Mitchell v. United States*, 34 U.S. 307 (The principal opinion is reported under the style of *Mitchel v. United States*, 34 U.S. 711). The entire preliminary opinion is set out as follows:

"A pamphlet has been sent to the judges touching the questions in controversy in this cause. The court desire it to be understood that the practice of the court is not to receive or examine such papers, unless they have been *presented in court* and shown to the opposite counsel.

"It was afterwards, on the same day, stated to the court by Mr. White, of Florida, counsel for the appellant, that the counsel on neither side had any knowledge of the pamphlet's having been sent to the court, nor did they in any manner countenance the same. The pamphlet was sent to the judges by an agent of the appellant, who was not in any manner aware of the irregularity of the proceeding."

We have heard of a practice in which parties wishing to influence a favorable judicial decision attempt to "plant" appropriate articles in law journals or other publications which might reach the eyes of a judge before such a decision is to be made. However we did not know of any practice whereby extra judicial writings were supplied to the court as appendices.

The present pamphlet makes no reference whatsoever in its text to any part of the record in the pending cause. It is completely hearsay, and is not within any recognized exception to that salutary rule. Neither the student who wrote it nor the self-described, non-expert who lent his "authentication" to it, were—with respect to its contents—subject to the sanction of an oath, to a search for their motives, to a test of their accuracy or veracity. They were

without responsibility for errors of omission or falsification.

In *Donnelly v. United States*, 228 U.S. 243, this Court ably defined most of the bases in reason on which hearsay evidence was excluded by courts. In that case the court stated:

"Hearsay evidence, with a few well-recognized exceptions, is excluded by courts that adhere to the principles of the common law. The chief grounds of its exclusion are, that the reported declaration, (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross examination, *these being most important safeguards of the truth* where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in court to the extrajudicial declaration does so (especially where the alleged declarant is dead) free from the embarrassment of present contradiction, and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probabilities of error, and that hearsay evidence is an unsafe reliance in a court of justice."

In *Bridges v. Wixon*, 326 U.S. 135, 153, the court refused to admit a hearsay statement as substantive evidence, pointing out:

"So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded."

Much of the pamphlet purports to be a rescript of opinions of others taken from publications, books and newspaper

editorials," and of newspaper reports in which the reporter purports to quote from opinions of third persons. With a sufficiently lurid cover this tract might be acceptable on some news-stands; however, it would have been totally unacceptable if counsel for any party had tendered it in the court below. It certainly should not be taken as the equivalent of a part of the record on this appeal.

It is with deference to the eminent former Attorney General of the United States and his associates, who sponsored the filing of this pamphlet, that we submit that it falls squarely within the following ruling announced by Mr. Justice Harlan in *Schley v. Pullman's Palace Car Co.*, 120 U.S. 575:

"Before entering upon the consideration of the case it is proper to notice the motion made in behalf of the plaintiff in error, to strike out certain parts of the printed argument filed by the counsel for the defendant in error. Notwithstanding the agreement that the case should be heard in the court below upon the single question referred to in the stipulation, the counsel for the defendant in error states many things which he declares to be "incontrovertible facts," and within the knowledge of opposing counsel, but which are wholly unsustained by anything in the record. The motion to strike out relates to those matters. The excuse given for this breach of professional propriety is "the extreme brevity of the record." But it is the same record upon which counsel for the company succeeded for his client, and which, by agreement, contained all that was to be submitted to the court. The excuse given furnishes no apology whatever for his violation of the terms of the stipulation. Much less does it palliate his attempt to influence the decision

here by reference to matters not in the record, and which he must have known could not be taken into consideration. It is only necessary to say that the facts *dehors* the record, which have been improperly introduced into the brief of the counsel for the defendant in error, have not in any degree influenced our determination of the case."

In addition to its substantive defects, the appendix pamphlet failed to comply with the rules of this court relating to printing and filing.

When the appendix was first lodged with the office of the clerk it was not printed in accordance with the requirements of Rule 39. When it was lodged with the clerk in printed form, the time specified for its filing, under Rule 42(2), had expired, in that the time allowed for the filing of the brief of the party supported had expired. Appellees have received no request for any extension of time within which to file this pamphlet. They, therefore, have not agreed to any such extension of time. The office of the clerk has not notified appellees that any such extension has been granted by the clerk, by the court, or by any Justice thereof [Rule 34(5)].

## CONCLUSION

The motions of Appellees to strike portions of the brief and the entire appendix filed by the *amicus curiae* should be sustained.

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